

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL HALDANE, WENDEL
JOHNSON, TIMOTHY MARTIN, and
LEESHAWN REDIC,

Plaintiffs,

vs.

G. STEVEN HAMMOND, M.D., Chief
Medical Officer of the Washington State
Department of Corrections, and DAN
PACHOLKE, Secretary of the Washington
State Department of Corrections, in their
official capacities,

Defendants.

No. 15-CV-1810

ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiffs' Motion for Class Certification and Appointment of Class Counsel. Dkt. ## 47, 81. Defendants oppose the Motion. Dkt. # 90. Having considered the parties' briefs and balance of the record, the Court

1 finds oral argument unnecessary. For the reasons stated below, the Court **DENIES**
2 Plaintiffs' Motion.

3 **II. BACKGROUND**

4 Plaintiffs are prisoners in the custody of the Washington Department of
5 Corrections (DOC). Dkt. # 1 (Complaint). DOC's healthcare services are subject to the
6 Offender Health Plan (OHP). *Id.* at ¶ 9. The OHP defines what types of medical care are
7 "medically necessary." *Id.* at ¶ 10; *see also* Dkt. # 47-1 at 11-12 (defining "medical
8 necessity"). The OHP segregates care into three Levels: Level 1 care is considered
9 medically necessary such that a practitioner may authorize treatment; Level 2 care
10 constitutes care that may be medically necessary but requires authorization by the Care
11 Review Committee (CRC); Level 3 care is not medically necessary and therefore a
12 practitioner may not authorize treatment. Dkt. ## 47-1 at 13, 47-2 at 1.

13 The CRC is composed of physicians, physician assistants, and nurse practitioners.
14 Dkt. ## 1 (Complaint) at ¶ 13, 47-2 at 2-5 (describing the CRC Review Procedure). The
15 committee meets every week for a teleconference that lasts up to two hours. Dkt. # 1
16 (Complaint) at ¶ 15. The committee decides whether Level 2 care should be
17 authorized—thereby raising it to Level 1 status—or denied—demoting it to Level 3.

18 Plaintiffs each have ailments for which their providers submitted requests to the
19 CRC for specific treatment. *See generally* Dkt. # 1 (Complaint) at ¶¶ 26-71. The CRC
20 denied treatment, and Plaintiffs claim that the refusals lead to their continued suffering
21 from severe pain and limitations on daily living. *Id.* at ¶¶ 41, 54, 62, 71. Plaintiffs argue
22 that the CRC is unreasonably denying care not just to the named plaintiffs but to an entire
23 class of inmates. Accordingly, Plaintiffs filed a class action lawsuit against DOC and its
Chief Medical Officer and Secretary.

24 **III. LEGAL STANDARD**

25 The Court's decision to certify a class is discretionary. *Vinole v. Countrywide*

1 *Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). Federal Rule of Civil Procedure 23
2 (“Rule 23”) guides the Court’s exercise of discretion. A plaintiff “bears the burden of
3 demonstrating that he has met each of the four requirements of Rule 23(a) and at least
4 one of the [three alternative] requirements of Rule 23(b).” *Lozano v. AT&T Wireless*
5 *Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires a plaintiff to
6 demonstrate that the proposed class is sufficiently numerous, that it presents common
7 issues of fact or law, that it will be led by one or more class representatives with claims
8 typical of the class, and that the class representative will adequately represent the class.
9 *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); Fed. R. Civ. P. 23(a).

10 If a plaintiff satisfies the Rule 23(a) requirements, he must also show that the
11 proposed class action meets one of the three requirements of Rule 23(b). *Zinser v.*
12 *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Here, Plaintiffs move
13 for class certification under Rule 23(b)(2). Rule 23(b)(2) requires that “the party
14 opposing the class has acted or refused to act on grounds that apply generally to the class,
15 so that final injunctive relief or corresponding declaratory relief is appropriate respecting
16 the class as a whole.” Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is met where “a single
17 injunction or declaratory judgment would provide relief to each member of the class.”
18 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

19 In considering Rule 23’s requirements, the Court must engage in a “rigorous
20 analysis,” but a “rigorous analysis does not always result in a lengthy explanation or in
21 depth review of the record.” *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir.
22 2005) (citing *Falcon*, 457 U.S. at 161). The Court is neither permitted nor required to
23 conduct a “preliminary inquiry into the merits” of the plaintiff’s claims. *Blackie v.*
Barrack, 524 F.2d 891, 901 (9th Cir. 1975) (citing *Eisen v. Carlisle & Jacquelin*, 417
U.S. 156, 177 (1974)); *see also* Fed. R. Civ. P. 23 advisory committee’s note (2003)
 (“[A]n evaluation of the probable outcome on the merits is not properly part of the
 certification decision.”); *but see Dukes*, 564 U.S. at 351 (suggesting that Rule 23 analysis

1 may be inextricable from some judgments on the merits in a particular case). The Court
2 may assume the truth of a plaintiff's substantive allegations, but may require more than
3 bare allegations to determine whether a plaintiff has satisfied the requirements of Rule
4 23. *See, e.g., Blackie*, 524 F.2d at 901, n.17; *Clark v. Watchie*, 513 F.2d 994, 1000 (9th
5 Cir. 1975) ("If the trial judge has made findings as to the provisions of the Rule and their
6 application to the case, his determination of class status should be considered within his
7 discretion.").

8 **IV. DISCUSSION**

9 Plaintiffs propose that the Court certify the following class:

10 All current and future prisoners, incarcerated under the
11 jurisdiction of the Washington Department of Corrections,
12 whose access to necessary medical care has been denied, or
13 will be subject to denial, under the Department's policies and
14 practices governing access to health care requiring prior
15 approval.

16 Dkt. # 1 (Complaint) at ¶ 73. The Court takes issue with Plaintiffs' ability to satisfy Rule
17 23(a)'s commonality requirement and will therefore limit its analysis to this core
18 requirement of Rule 23(a).

19 **A. Commonality**

20 Plaintiffs fail to satisfy the commonality requirement of Rule 23(a). Plaintiffs rely
21 on *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), to show that their allegations satisfy
22 Rule 23 and to urge this Court to grant class certification. Though the Court agrees that
23 *Parsons* is on point in this matter, the Court disagrees that *Parsons* aids the Plaintiffs in
their arguments.

In *Parsons*, the Ninth Circuit upheld the district court's order granting class
certification. There, the plaintiffs' 74-page complaint detailed the Arizona Department of
Correction's (ADC) mass deficiencies, going so far as to outline fifteen specific, uniform,

1 statewide policies and practices that exposed all ADC's inmates to a substantial risk of
2 harm. *Id.* at 664. The complaint included graphic examples in which medical staff gave
3 prisoners expired medication, caused prisoners to reuse catheters, and delayed care when
4 outside contracts were cancelled. *Id.* at 664-666 n.5-7. Additional examples included
5 correctional officers standing by while a prisoner bled to death after a suicide attempt and
6 failing to perform CPR on a patient who collapsed from a heart attack. *Id.* The plaintiffs
7 argued that the defendants' policies and practices violated the Eighth Amendment
8 because they were deliberately indifferent to inmates' health and safety and exposed
inmates to a substantial risk of serious harm.

9 The plaintiffs supported their motion for class certification in *Parsons* with ample
10 evidence collected through the discovery process. Some of the more pertinent documents
11 included communications between the ADC and its health services provider in which
12 ADC "identified serious and systemic deficiencies in [the health services provider's]
13 provision of health care to ADC inmates." *Id.* at 668. The health services provider
14 responded by "condemn[ing] the low quality of ADC's preexisting programs." *Id.* Other
15 documents obtained through discovery uncovered practitioners' warnings of "abysmal
16 staffing" that was "'grossly insufficient' and 'so limited that patient safety and orderly
17 operation of ADC facilities may be significantly compromised.'" *Id.* (docket citations
omitted).

18 The plaintiffs further supported their motion in *Parsons* with unrebutted expert
19 reports that validated the practitioners' criticisms. *Id.* at 669-671. The reports were
20 detailed and included observations that there were system-wide defects and deficiencies
21 that "placed prisoners at serious risk of harm, and in some cases, death." *Id.* at 669. The
22 plaintiffs also included declarations by the named plaintiffs describing their experiences
23 with ADC policies. *Id.* at 672.

1 Having reviewed the evidence and the lower court’s conclusions, the Ninth Circuit
2 agreed that the plaintiffs had satisfied the elements of Rule 23(a).¹ As to the
3 commonality requirement, the court found that all ADC inmates were exposed to
4 “specified statewide ADC policies and practices that govern the overall conditions of
5 health care services and confinement,” and this exposure resulted in “a substantial risk of
6 serious future harm to which the defendants are deliberately indifferent.” *Id.* at 678. The
7 court found that the identified policies and practices were “the ‘glue’ that holds together
8 the putative class . . . either each of the policies and practices is unlawful as to every
9 inmate or it is not.” *Id.*

10 Plaintiffs in this case attempt to bring what they believe are similar claims against
11 DOC. Like in *Parsons*, Plaintiffs’ claims are grounded in the Eighth Amendment.
12 Though the Court does not expressly analyze the merits of the claims at this stage in
13 litigation, it must briefly consider the nature of the underlying claims to properly analyze
14 whether the claims meet Rule 23(a)’s commonality requirement. Accordingly, the Court
15 reiterates that Plaintiffs’ carry the burden to prove that Defendants were “deliberately
16 indifferent to policies and practices that expose inmates to a substantial risk of serious
17 harm.” *Id.* at 677.

18 In contrast to the plaintiffs in *Parsons*, Plaintiffs in this case have not adequately
19 identified common policies and practices to show that Defendants were deliberately
20 indifferent to inmates’ needs. Without proving a common set of policies and practices
21 exist, Plaintiffs have failed to meet their burden under Rule 23(a)(2). Plaintiffs
22 specifically identify four questions of law and fact that they claim are common to the
23 class. Dkt. # 1 (Complaint) at ¶ 77. These questions have their own common theme:
whether the CRC systematically and unreasonably denies Level 2 claims. In their
Complaint, Plaintiffs outline the CRC meetings in which members spend one to two

¹ *Parsons* is an extreme case. *Parsons*, 754 F.3d at 683 (“Here, however, the plaintiffs have met, and indeed far exceeded, that requirement.”). By no means is *Parsons* the floor Plaintiffs must surpass to succeed on their Motion.

1 hours reviewing dozens of cases. *Id.* at ¶ 15. Plaintiffs explain that many CRC members
2 are not as familiar with the areas of medicine as the patients’ treating physicians and on
3 many occasions have not had the opportunity to physically examine the patient. *Id.* at ¶¶
4 14, 18. Plaintiffs claim that these faults are evidence of deliberate indifference.

5 To support their motion, Plaintiffs include various declarations, deposition
6 excerpts, and an expert report² attempting to illustrate that the care afforded to DOC
7 prisoners is subpar. By way of example, Plaintiffs include an exchange between DOC
8 physicians in which one physician remarks that DOC physicians “walk a fine line
9 between medical necessity in the OHP and what would be a charge of medical
10 malpractice on the outside.” Dkt. # 47-11 at 18. Plaintiffs’ expert, Todd Wilcox, opined
11 on the inadequacy of the CRC to make educated judgments as to medical necessity for
12 many of the treatment regimens proposed by prisoners’ treating physicians. Dkt. # 47-11
13 at 3-7. Dr. Wilcox targeted the CRC’s lack of specialized care and failure to defer to
treating physicians as a deviation from the standard of care in healthcare. *Id.* at 4.

14 CRC members explained in depositions that meetings often turned on how the
15 committee could “justify a no” when considering treatment. Dkt. # 47-5 at 36. Some
16 members strategized ways to obtain necessary care for their patients, sometimes by
17 asking for more care than necessary so that a concession would result in the correct
18 amount of care. Dkt. # 72 at 8. But none of these members admitted that a perceived
19 culture of “no” affected their own behavior or caused them to vote against their
20 judgment. CRC members opined on whether some mid-level medical staff were less
21 “independent,” but no CRC members affirmatively answered that another member had
22 been swayed by non-medical reasons.

23 Though Plaintiffs’ evidence is certainly concerning and could evidence poor
performance—or even malpractice—on the part of DOC practitioners, it does not

² Unlike the expert reports described in *Parsons*, Dr. Wilcox’s report is full of generalities. Dkt. # 47-11 at 1-14. The Court would not expect Defendants to expend resources submitting a rebuttal to this particular report.

1 evidence a common policy or practice by the CRC to systematically and unreasonably
2 deny care. In opposition to Plaintiffs' motion, Defendants provided declarations from
3 treating doctors explaining why they proposed certain treatment regimens and the reasons
4 the CRC may have denied those suggestions. *See, e.g.*, Dkt. # 93 at 1-14. Plaintiffs
5 submitted medical records that corroborated the doctors' declarations, oftentimes
6 evidencing a concerted and prolonged effort to treat and care for the inmates. For
7 example, an inmate, L.G., submitted a declaration alleging that the CRC's initial denials
8 of a colonoscopy led to a late finding of colon cancer. Dkt. # 58 at 1-7. But L.G.'s
9 medical records show that a single request for a colonoscopy was made to the CRC,
10 which the CRC granted. Dkt. # 58-2 at 3. L.G.'s treating physician, Dr. Mary Colter,
11 stated that the clinic began treating L.G. in December 2010 with a computed tomography
12 scan, followed by more than sixteen follow-up visits in 2011, twenty visits in 2012, and
13 eight visits in 2013. Dkt. # 93 at 4. In September 2014, L.G. reported that she had had
14 rectal bleeding at some point prior but failed to report to the clinic. *Id.* L.G.'s case was
15 presented only once to the CRC—in December 2014—at which point the CRC approved
16 the requested colonoscopy. *Id.* at 5. Said differently, the CRC was not involved in
17 L.G.'s case prior to December 2014 and therefore could not have acted indifferently
18 toward her until it was presented with her file. And, when presented with L.G.'s case, the
19 CRC approved the recommended course of treatment.

20 Plaintiffs target the CRC in their lawsuit, but the evidence they present to the
21 Court does not validate their claims. Rather, the parties' evidence shows disagreements
22 about which treatment options are more appropriate for each patient. *See, e.g.*, Dkt. ##
23 47-5 at 25 (a physician's assistant (PA) explains that it is "not uncommon for [inmates] to
be tapered off of gabapentin to try other modalities" even though the PA, herself, may
disagree with this treatment decision), 94-1 at 7-8 (explaining different ways a surgeon
could approach a hernia repair that would be within the definition of "medical
necessity"). But disagreements between physicians do not amount to Eighth Amendment

1 violations. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (“But the question whether an X-
2 ray or additional diagnostic techniques or forms of treatment is indicated is a classic
3 example of a matter for medical judgment. A medical decision not to order an X-ray, or
4 like measures, does not represent cruel and unusual punishment. At most it is medical
5 malpractice, and as such the proper forum is the state court”); *see also Jackson v.*
6 *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (“To prevail under these principles, [the
7 plaintiff] must show that the course of treatment the doctors chose was medically
8 unacceptable under the circumstances, and the plaintiff must show that they chose this
9 course in conscious disregard of an excessive risk to plaintiff’s health.”) (internal citations
10 omitted). Neither does “every claim by a prisoner that he has not received adequate
11 medical treatment state[] a violation of the Eighth Amendment.” *Estelle*, 429 U.S. at
12 291. To be clear, the common question presented for class certification is whether the
13 CRC’s policies and practices have resulted in Defendants’ deliberate indifference to the
14 proposed class such that the class is exposed to a substantial risk of serious harm. But, as
15 pled and argued, the Court does not find common policies and practices that amount to
16 deliberate indifference.

17 Plaintiffs’ Reply includes a declaration from a new expert, Dr. Straley. Dkt. ##
18 105, 108. Dr. Straley appears to address the deficiencies in the OHP. The OHP,
19 generally, is not before the Court for consideration. Much of Plaintiffs’ Reply
20 improperly includes arguments and evidence that were absent from both Plaintiffs’
21 Complaint and their motion for class certification, both of which focus solely on the CRC
22 and are supported primarily by Dr. Wilcox’s report. By raising new arguments on Reply
23 that are not present in their Complaint, Plaintiffs have failed to put Defendants on notice
to the claims against which they must defend and denied them the opportunity to respond
to the arguments in responsive briefs. The Court will not consider the new arguments
and evidence raised for the first time in Plaintiffs’ Reply. *See Bridgham-Morrison v.*

1 *Nat'l Gen. Assurance Co.*, No. C15-927RAJ, 2015 WL 12712762, at *2 (W.D. Wash.
2 Nov. 16, 2015); *see also U.S. v. Patterson*, 230 F.3d 1168, 1172 n.3 (9th Cir. 2000).

3 The Plaintiffs specifically request that the Court certify a class action based upon
4 the policies and procedures of the CRC, but they have failed to meet their burden under
5 Rule 23(a)'s commonality requirement. Accordingly, the Court need not analyze Rule
6 23(a)'s other requirements.

7 **V. CONCLUSION**

8 Based on the foregoing, the Court **DENIES** Plaintiffs' motion for class
9 certification. Dkt. ## 47, 81. This Order renders Mr. Wilton's motion to intervene
10 **MOOT**. Dkt. # 114. The Court further **DENIES** Defendants' motion to strike portions
of Plaintiffs' reply. Dkt. # 112.

11 Dated this 18th day of September, 2017.

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15 The Honorable Richard A. Jones
16 United States District Judge
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